

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	
Reclassification and Compensation Provisions	)	CC Docket 96-128
of the Telecommunications Act of 1996	)	
	)	
Petition of the Independent Payphone Association	)	
of New York, Inc. to Pre-empt Determinations of	)	
the State of New York Refusing to Implement the	)	
Commission's Payphone Orders, and For a	)	
Declaratory Ruling	)	

**COMMENTS OF THE**  
**ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION**

The Illinois Public Telecommunications Association (“IPTA”) supports the Petition of the Independent Payphone Association of New York (“IPANY”) for a declaratory ruling to enforce the Commission’s orders implementing Section 276 of the Telecommunications Act of 1996. The IPANY Petition highlights the growing need for the Commission’s declaratory ruling on the implementation and enforcement of the Commission’s *Payphone Orders*<sup>1</sup> and *Wisconsin Order*.<sup>2</sup>

In establishing the instant pleading cycle, the Commission recognized that the IPANY Petition appears to raise the same or substantially similar issues raised in the IPTA Petition filed

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<sup>1</sup> *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) (“*First Payphone Order*”), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 (“*Payphone Reconsideration Order*”) *aff’d in part and remanded in part sub nom. Illinois Public Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com’n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) (“*Bureau Waiver Order*”); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) (“*Bureau Clarification Order*”) (collectively “*Payphone Orders*”).

<sup>2</sup> *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶ 31 (Jan. 31, 2002)(“*Wisconsin Order*”) *aff’d sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 rehearing and rehearing en banc denied (Sep. 22, 2003).

on July 30, 2004<sup>3</sup> and has agreed to a consolidated consideration of the petitions with one filed on November 9, 2004 by the Southern Public Communications Association.<sup>4</sup> Therefore, the IPTA will not burden the Commission with reiterating the points addressed in the IPTA Petition or in the IPTA Reply Comments on the IPTA Petition since the Commission is consolidating its consideration of these matters, but directs the Commission to the IPTA statements already on file.

The IPTA submits that even more evidence of inconsistent application and enforcement of the Commission's *Payphone Orders* continues to mount and demands the Commission's input through the declaratory rulings requested by the IPTA, SPCA, IPANY, and other payphone providers. These continuing and contradictory holdings reflect the outstanding legal controversy surrounding the Section 276 requirements and the need for a declaratory ruling to remove the uncertainty with respect to enforcement of the Commission's *Payphone Orders* and *Wisconsin Order*.

## **I. THERE CONTINUES TO BE AN OUTSTANDING LEGAL CONTROVERSY AND UNCERTAINTY REGARDING ENFORCEMENT OF FEDERAL LAW.**

The IPTA Petition reviewed the Commission's *Payphone Orders* and requirements surrounding the Section 276 requirement for the RBOCs to provide cost based rates that comply with the Commission's new services test. It also addressed the Commission's orders requiring new services test compliance as a condition precedent to the RBOCs being eligible to receive dial around compensation ("DAC") on their payphones. The Illinois Commerce Commission

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<sup>3</sup> *The Illinois Public Telecommunications Association's Petition for A Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders*, Public Notice, DA 04-2487, issued August 6, 2004 ("IPTA Petition").

<sup>4</sup> *The Southern Public Communications Association's Petition for A Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders*, Public Notice, DA 04-3653, issued November 19, 2004 ("SPCA Petition").

(“ICC”) found that Illinois Bell Telephone Company d/b/a SBC Illinois (“SBC Illinois”) did not provide payphone providers with cost based rates and was not in compliance with the Commission’s new services test prior to December 13, 2003. Although SBC Illinois did not meet the Commission’s condition precedent for eligibility to receive DAC on the SBC Illinois payphones, the record established that SBC Illinois had been receiving DAC since April 15, 1997. Despite these direct violations of the Commission’s *Payphone Orders*, the ICC refused to require SBC Illinois either to refund to the competing payphone providers the excessive charges or to disgorge itself of the DAC to enforce effective compliance with this Commission’s orders. The IPTA noted that the ICC decision stood in direct contrast to six other state commissions that had ordered refunds of the RBOC charges in excess of the cost based rates required by the new services test.<sup>5</sup>

In addition to the six states mentioned in the IPTA Petition, the Indiana Utility Regulatory Commission (“IURC”) had found that the rates tariffed by Indiana Bell Telephone Company and GTE (now Verizon) were in excess of the appropriate cost based rates required under the new services test. As such, the incumbent local exchange carriers were ordered to issue refunds back to April 15, 1997.<sup>6</sup> However, in contrast to the orders of these seven state commissions, the IPANY and SPCA petitions identify that New York and Mississippi commissions have failed to require the refunds necessary to enforce the Commission’s orders, in addition to the Illinois and Massachusetts commissions.<sup>7</sup>

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<sup>5</sup> IPTA Petition at 15.

<sup>6</sup> *In the Matter of the Request of the Indiana Payphone Association for the Commission to Conduct an Investigation of Local Exchange Company Pay Telephone Tariffs for Compliance with Federal Regulations, and to Hold Such Tariffs in Abeyance Pending Completion of Such Proceeding*, Indiana Utility Regulatory Commission Cause No. 40830, Order, September 6, 2000.

<sup>7</sup> IPTA Petition at 16; IPTA Reply Comments at 4.

The courts share in the diametrically opposed holdings found in the commission decisions. The IPANY Petition notes how two New York courts took opposite interpretations of whether refunds for any charges in excess of federally required cost based rates would be due to payphone providers. Although the New York Supreme Court held that refunds would be due, the Appellate Division of the State Supreme Court found that refunds were not required. The New York Appellate Division also failed to enforce the requirements in the Commission's *Wisconsin Order*. Since this ruling two other state courts have disagreed with these holdings of the New York Appellate Division.

On appeal of the order of the Public Service Commission of Kentucky, a Kentucky state court affirmed the Kentucky Commission's decision holding that payphone providers were entitled to refunds for charges that exceeded the cost based rates as defined by the *Wisconsin Order*.<sup>8</sup> Furthermore, the Oregon Appellate Court has held that the Commission's *Wisconsin Order* was applicable to all of the states, citing the holding of the United States Court of Appeals, District of Columbia, affirming the *Wisconsin Order*.<sup>9</sup> In contrast to the New York Court, the Oregon Appellate Court has found that the Commission's new services test requirements are applicable and binding on all state regulatory commissions, reversing the commission's failure to implement this Commission's holding. Undoubtedly, when the Oregon Commission effectuates the Oregon Appellate Court's holdings, the issue of refunding excessive overcharges will be in issue again.

These decisions continue to emphasize the need for the Commission's issuance of a declaratory ruling implementing enforcement of section 276 and the Commission's orders in a

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<sup>8</sup> *Kentucky Payphone Association, Inc. v Public Service Commission of Kentucky, et al.*, Commonwealth of Kentucky, Franklin Circuit Court, Civil Action No. 03-CI-00797, Division II, Order, November 23, 2004, IPTA Comments, Appendix A.

<sup>9</sup> *Northwest Public Communications Council v. Public Utility Commission of Oregon*, 196 Or.App. 94, 100 P.3d 776 ( November 10, 2004).

consistent manner. The Commission needs to resolve this matter of federal law in a consistent manner that enforces its orders and directives by granting the IPANY Petition.

## **II. NEW YORK HAS FAILED TO IMPLEMENT THE COMMISSION'S WISCONSIN ORDER**

The New York Petition demonstrates yet another example of how the Regional Bell Operating Companies ("RBOCs") have actively and aggressively sought to abuse the regulatory process, taking advantage of the enormous benefits in DAC granted by the Commission while avoiding the Commission's precondition obligations to provide cost based rates to competing payphone service providers. The RBOCs' gaming of the system stands squarely in defiance of the Commission's repeated orders emphasizing that the provision of cost based rates in actual compliance with the Commission's new services test is a prerequisite for an RBOC's receipt of DAC.

Instead of RBOC compliance, the IPANY Petition presents a regulatory record of RBOC avoidance and violation of the Commission's orders. This petition establishes through the rulings of the New York Public Service Commission and the reviewing New York state courts how Verizon actively and successfully has avoided the Commission's explicit requirements that Verizon's rates to competing payphone providers: 1) be based on forward looking economic direct costs; 2) use an overhead loading consistent with comparable services, unless another method is justified; 3) apply the new services test to usage sensitive services; and 4) take into account the end user common line charge in determining the charges for recovery of Verizon's costs.<sup>10</sup> The U.S. Court of Appeals affirmed these Commission requirements, expressly holding that the *Wisconsin Order* "establishes a rule that affects payphone line rates in every state". *New*

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<sup>10</sup> *Wisconsin Order*.

*England Public Communications Council, Inc.*, 334 F.3d at 75. Yet, the New York state courts have failed to understand their applicability, in direct contrast to the Oregon Appellate Court.

Meanwhile, Verizon has enjoyed the benefit of collecting DAC for calls originating from Verizon payphones without meeting the Commission's precondition. Verizon has undertaken this action despite the Commission's repeated emphasis that actual compliance is a prerequisite for eligibility. Unless the Commission acts to ensure enforcement of its own orders, the significance of any Commission orders or enforcement criteria are severely undermined.

To correct the erroneously inconsistent position taken by the State of New York, and to enforce not only the existing orders but also the Commission's prospective actions, the Commission needs to grant the IPANY Petition's request for a declaratory ruling.

### **CONCLUSION**

For the reasons stated above, and for those stated in the IPTA Petition and the IPTA Reply Comments to the IPTA Petition, the Illinois Public Telecommunications Association respectfully submits that the Commission should grant the Independent Payphone Association of New York's Petition and order the relief requested therein.

/s/

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January 18, 2005

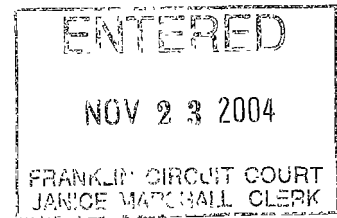
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**COMMENTS OF THE**  
**ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION**

**Appendix A: *Kentucky Payphone Association, Inc. v Public Service Commission of Kentucky, et al., Commonwealth of Kentucky, Franklin Circuit Court, Civil Action No. 03-CI-00797, Division II, Order, November 23, 2004***

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
CIVIL ACTION NO. 03-CI-00797  
DIVISION II**



**KENTUCKY PAYPHONE ASSOCIATION, INC.**

**PLAINTIFF/APPELLANT/**

**-vs-**

**ORDER**

**PUBLIC SERVICE COMMISSION OF  
KENTUCKY**

**DEFENDANT**

**and**

**BELLSOUTH TELECOMMUNICATIONS,  
INC., KENTUCKY ALLTEL, INC. AND  
CINCINNATI BELL TELEPHONE  
COMPANY**

**DEFENDANTS/APPELLEES/  
CROSS-APPELLANTS**

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**This action is a consolidated appeal of three complaints regarding multiple orders of the Kentucky Public Service Commission (PSC) in Administrative Case No. 361. The question raised by these appeals is the appropriate effective date for reducing the monthly public payphone access line rates by the amount of the federally-tariffed subscriber line charge (SCL).**

**I. BACKGROUND**

**For years the PSC has regulated this payphone access line charge assessed by incumbent local exchange carriers (ILECs) on payphone service providers. But with the**



federal Telecommunications Act of 1996, codified at 47 U.S.C. Sec. 151 et seq., the role of the PSC was circumscribed. 47 U.S.C. Sec. 276 requires the implementation of safeguards to insure that Bell-operated companies (BOCs like the defendant-cross-appellant Bell South) provide payphone service so as to not subsidize their own payphone service in preference toward or discrimination against other payphone service providers. The federal legislation required the Federal Communications Commission to create regulations “to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.” 47 U.S.C. Sec. 276(b)(1). One important goal of these regulations was to institute nonstructural safeguards for BOC payphone service. The major component of these safeguards was to be a pricing based on a “new services test” defined as a “cost-based test that sets the direct cost of providing the new service as a price floor and then adds a reasonable amount of overhead to derive the overall price of the new service.” See, In the Matter Of Wisconsin Public Service Commission Order Directing Filings, Bureau/CPD No. 00-01, FCC 02-25 (released January 31, 2002) (“Wisconsin Order”).

Since 1996, 47 U.S.C. Sec. 276 has set specific goals for the regulation of all payphone service. 47 U.S.C. Sec. 276(c) exempts any state requirements that are inconsistent with FCC regulations in these matters. Thus, federal law preempts any inconsistent state regulation. The ultimate goal of this legislation is to promote competition among payphone service providers and widespread deployment of payphone services for the benefit of the public.

**In response to the new federal mandates of 47 U.S.C. Sec. 276 the PSC undertook proceedings to set interstate and intrastate tariffs for payphone services in Kentucky which would meet the federally mandated goals. Again, those federally mandated goals were rates which were: (a) cost-based, (b) consistent with all requirements of Sec. 276 (for example, the removal of any subsidies from exchange and exchange access carriers), and (c) non-discriminatory. The Computer III guidelines of these new requirements applied non-structural safeguards including the “new services test” for setting tariffs.**

**As a beginning premise, the PSC has taken the position that even though the FCC regulations apply only to the BOC’s, in Kentucky the federal mandates would also apply to all major non-BOC ILEC’s (in this case, ALLTEL and Cincinnati Bell). Thus, ALLTEL and Cincinnati Bell (the non-BOC’s) have been required by the PSC to price their services in conformity with the “new services test” under 47 U.S.C. Sec. 276.**

**On January 5, 1999, Kentucky’s PSC issued an order establishing payphone access line rates for both BOC’s and non-BOC’s. This order implemented the federally required new services test as it was then interpreted by the PSC. Plaintiffs herein, the Kentucky Payphone Providers were a party to this administrative proceeding.**

**On February 15, the PSC, issued a new order addressing several issues raised on petitions for rehearing. One of those issues was whether the “new services test” required that the calculation of access line rates take into account the subscriber line charge (SCL). The PSC determined that the SCL was a federally imposed charge over which it had no control and that it would be improper for the PSC to require reductions in the rates by offsetting the SCL, unless directed to by the FCC. The Kentucky Payphone Providers did not appeal these**

**rulings.**

**As a result of these orders, both the BOC and the non-BOC ILEC's continued to assess PSC-approved rates which did not account for the subscriber line charge for several years. Then, on January 31, 2002, the FCC released its Wisconsin Order. The Wisconsin Order clarified that its federally mandated New Services Test requires that the monthly line charge by the ILEC's must be reduced by the amount of the applicable federally tariffed SLC. It is undisputed that the Wisconsin Order applied directly only to BOC-ILEC's (in this case BellSouth).**

**The FCC indicated that the purpose of its Wisconsin Order was to "assist the states in applying the new services test to BOC's intrastate payphone line rates." The FCC went on to explain that "at whatever point in time a state reviews a BOC's payphone line rates in compliance with the new services test, it must apply an offset for the SLC that is then in effect." This ruling clearly placed the Kentucky PSC approved rates at variance with federal regulatory law.**

**Nine months after the Wisconsin Order, the KPA petitioned the PSC to apply the principles of the Wisconsin Order to the Kentucky rates of both the BOC and the non-BOC-ILEC's. In its initial May 1, 2003 Order, the PSC ordered both BOC and non-BOCs to reduce their payphone access line charges by the amount of the SLC, but only on a prospective basis. KPA petitioned for a rehearing, arguing that its members were entitled to refunds dating back to the PSC's original order. On June 5, 2003, the PSC granted this petition in part, granting a refund to the date of the Wisconsin Order. As reason for this change, the PSC explained that "the LEC**

**'s themselves should have taken action to adjust their rates - at least on a going forward basis - when the FCC issued its January 231, 2002 Order explaining that the SLC must be considered when setting payphone access rates."**

**This appeal ensued. The KPA argues that the refunds are owed back to the date of the original 1997 proceeding. BellSouth, Kentucky ALLTEL and Cincinnati Bell argue that the new rates should only be prospective.**

## **II. SCOPE OF REVIEW AND BURDEN OF PROOF**

**KRS 278.410(1) proves that an order of the PSC can be vacated or set aside only if it is found by clear and satisfactory evidence to be unlawful or unreasonable. A utility challenging a PSC order has the burden of proof to show by clear and satisfactory evidence that the order is unlawful or unreasonable. KRS 278.430.**

**The PSC's May 1, 2003 and June 5, 2003 orders demonstrate the Psc's understanding of the FCC's regime for regulating payphone access rates. They also evidence the PSC's policies of requiring this regime to be in effect for the major LECs in Kentucky as of the date announced by the FCC. No party has provided clear and satisfactory evidence to the contrary. As such, these orders are both lawful and reasonable.**

## **III. THE PSC'S ORDER RELATING TO BELL SOUTH**

**The PSC determination that BellSouth had an affirmative duty to align its rates with the FCC holding in the Wisconsin Order is reasonable and lawful.**

The FCC held squarely in its Wisconsin Order that “Therefore, in establishing its cost-based, state-tariffed charge for payphone line services, a BOC must reduce the monthly per line charge determined under the new services test by the amount of the applicable federally tariffed SLC.” Wisconsin Order, paragraph 61. With the announcement of this doctrine, all state regulation of BOC’s to the contrary was pre-empted. 47 U.S.C. 276(c). We agree with the PSC that this pre-emption trumps the Filed Rate Doctrine and any complaint of retroactive rate-making. BellSouth was on notice that the payphone compensation rates must be reduced by the applicable SLC as of January 21, 2002. From that date BellSouth had the affirmative duty to file tariffs in compliance with the FCC mandate. This duty cannot be voided by inaction when federal law preempts the subscriber rates in question. In January, 2002, these line charges became ill-gotten gain under federal law, and the PSC’s order of a refund to that date is both reasonable and required under the law.

#### **IV. THE COMMISSION’S ORDER RELATING TO ALLTEL AND CINCINNATI BELL**

Without caveat, the Wisconsin Order by the FCC on its face applied only to BOC’s. ALLTEL and Cincinnati Bell argue that as non-BOC’s that order had no application to their rates. As such, they are protected by the filed-rate doctrine and the doctrine against retroactive rate-making, making the PSC’s June 5, 2003 Order only prospective as to them.

In its 1999 Orders, the PSC made clear that as a matter of state law, both BOC’s and non-BOC’s are required to adopt and implement rates which comport with the FCC’S New Services Test regulations. In its 1999 Orders, however, the PSC determined that the New

Services Test regulations did not require the ILEC's to account for the SLC in setting the monthly payphone access rates. These orders were not appealed. Thus, those orders defined the state law in Kentucky until the FCC clearly announced that the New Services Test required an accounting of the SLC. In its 2003 Orders, the PSC has determined that both the BOC's and non-BOC's must refund the amounts of the SLC back to the date of the Wisconsin Order. The PSC's final 2003 order is both reasonable and lawful as to the non-BOC's. The PSC clearly enunciated in its 1999 Orders that the federal pricing scheme defined in the FCC's New Services Test regulations would apply to non-BOC's such as ALLTEL and Cincinnati Bell as well as BellSouth. The PSC's 1999 determination that the New Services Test did not include the SCL was "a thing decided" until the preemptive determination by the Wisconsin Order. The PSC was emphatic in its 1999 orders that both BOC's and non-BOC's must conform their rates to the federal New Services Test. The file-rate doctrine and the prohibition against retroactive rate-making do not serve to protect the ILEC's when it became clear that the federal law required an adjustment in their rates under state law. The PSC's determination that all ILEC's subject to its 1999 order had a duty to self-comply is reasonable — indeed required — to accomplish the state-wide goals of competition and deployment in the payphone marketplace. The PSC's determination that these ILEC's must all refund the ill-gotten SCL's back to the date of the Wisconsin Order, cannot be avoided by the hiding behind doctrines which do not apply in the situation.

## **V. THE KPA'S COMPLAINT**

**The KPA's argument that the PSC's decision should have refunded the SLC's**

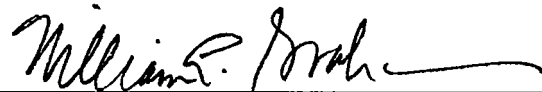
back to April 15, 1997 with respect to BellSouth and to 1999 with respect to ALLTEL and Cincinnati Bell fails. Until the Wisconsin Order, all three were protected by the Filed-Rate Doctrine. KPA participated in, and did not appeal, the PSC's 1999 orders. They cannot now be heard to complain until the FCC clearly announced in the Wisconsin Order that the New Services Test required the SLC be accounted for. The PSC's determination that the federal law on this issue was unclear, until the Wisconsin decision and that refunds are due only from the date of that order, is reasonable.

## **VI. CONCLUSION**

**WHEREFORE**, the June 5, 2003 Order of the Public Service Commission of Kentucky, is **AFFIRMED** and this action is **DISMISSED**.

**This is a final and appealable Order and there is no just cause for delay.**

**SO ORDERED** this 22<sup>nd</sup> day of November, 2004.



**WILLIAM L. GRAHAM, JUDGE  
FRANKLIN CIRCUIT COURT  
DIVISION II**

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## **CERTIFICATE OF SERVICE**

I hereby certify that, on January 18, 2005, a copy of the foregoing Comments of the Illinois Public Telecommunications Association to the Petition of the Independent Payphone Association of New York, Inc., was served by electronic mail to the parties below:

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